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November 21, 2017

VIA E-FILING
Ms. Jocelyn Boyd
Chief Clerk of the Commission
SC Public Service Commission
P. O. Drawer 11649
Columbia, SC 29211

RE: Request of the South Carolina Office of Regulatory Staff For Rate Relief to SCE&G Rates Pursuant to S.C. Code Ann. § 58-27-290
Docket No. 2017-305-E

Dear Ms. Boyd:

Enclosed please find for filing South Carolina Energy Users Committee ("SCEUC") Brief Opposing SCE&G's Motion to Dismiss in the above-captioned matter. By copy of this letter, I am serving all parties of record.

If you have questions, please do not hesitate to contact me.

Sincerely,

ELLIOTT & ELLIOTT, P.A.

Scott Elliott

SE/lbk

Enclosure
cc: All parties of record (w/encl.)

STATE OF SOUTH CAROLINA

BEFORE THE PUBLIC SERVICE COMMISSION

DOCKET NO. 2017-305-E

IN THE MATTER OF: Request of the South Carolina Office of Regulatory Staff for Rate Relief to SCE&G Rates Pursuant to S.C. Code Ann. § 58-27-920	)))))	**SOUTH CAROLINA ENERGY USERS COMMITTEE BRIEF OPPOSING SCE&G'S MOTION TO DISMISS**

"The BLRA, therefore, represents a legislatively crafted bargain between investors and the State of South Carolina." SCE&G's Brief in Support of its Motion to Dismiss, p. 22.

"She got the goldmine, I got the shaft." Jerry Reed, Singer, Songwriter 1982.

Introduction

The South Carolina Office of Regulatory Staff ("ORS") has made its request for rate relief pursuant to S.C. Code Ann. § 58-27-920, requesting *inter alia*, an order from this Commission requiring South Carolina Electric & Gas Company ("SCE&G") to suspend immediately all revised rates collections from customers. For the reasons set out, the South Carolina Energy Users Committee ("SCEUC") joins in the ORS request for rate relief. The motion to dismiss filed by SCE&G should be denied.

Facts

The South Carolina General Assembly enacted the Base Load Review Act ("BLRA") which became law without the Governor's signature effective May 22, 2007. SCE&G

subsequently sought a Base Load Review Order authorizing the construction of nuclear generating plants at its V. C. Summer nuclear site near Jenkinsville, South Carolina. By Order No. 2009-104(A) dated March 2, 2009, the Commission granted SCE&G's request for a Base Load Review Order authorizing the construction of these plants.

Subsequent to Order No. 2009-104(A), the Commission issued orders amending its initial Base Load Review Order in the following dockets and pursuant to the orders:

ORDERS APPROVING MODIFCATION AND SCHEDULES

Order No. 2010-12, dated January 21, 2010, Docket No. 2009-293-E

Order No. 2011-345, dated May 16, 2011, Docket No. 2010-376-E

Order No. 2012-884, dated November 15, 2012, Docket No. 2012-203-E

Order No. 2015-661, dated September 10, 2015, Docket No. 2015-103-E

Order No. 2016-794, dated November 28, 2016, Docket No. 2016-223-E

As a result of the five (5) amendments to SCE&G's 2009 Base Load Review Order, the Commission approved an additional $2.7 billion in cost overruns to those costs authorized by Order No. 2009-104(A).

In addition, relying on the provisions of S.C. Code Ann. § 58-33-280 (A)-(J), the Commission granted SCE&G nine (9) rate increases through revised rates by the following orders:

REVISED RATE ORDERS

Order No. 2009-104(A), dated March 2, 2009, Docket No. 2008-196-E

Order No. 2009-696, dated September 30, 2009, Docket No. 2009-211-E

Order No. 2010-625, dated October 1, 2010, Docket No. 2010-157-E

Order No. 2011-738, dated September 30, 2011, Docket No. 2011-207-E

Order No. 2012-761, dated September 28, 2012, Docket No. 2012-186-E

Order No. 2013-680(A), dated October 2, 2013, Docket No. 2013-150-E

Order No. 2014-785, dated September 30, 2014, Docket No. 2014-187-E

Order No. 2015-712, dated September 30, 2015, Docket No. 2015-160-E

Order No. 2016-758, dated October 26, 2016, Docket No. 2016-224-E

As a consequence of these nine (9) rate increases, SCE&G ratepayers are paying approximately $445 million annually in additional revenue for nuclear construction at the rate of approximately $37 million per month.

In addition, pursuant to Order No. 2009-104(A), SCE&G has filed with the Commission quarterly reports relating to its construction of the nuclear plants.

SCE&G officials informed the Commission in an allowable ex parte proceeding August 1, 2017, that it intended to abandon the construction of V.C. Summer Units 2 and 3. Its estimate of abandonment costs totaled $4.9 billion. SCE&G officials informed that after an offset of approximately $700 million in Toshiba guarantee funds and a tax deduction on abandonment of approximately $2 billion, the estimated abandonment costs to ratepayers would be at least $2.2 billion.

On August 1, 2017, SCE&G filed a petition seeking, *inter alia*, a prudency determination regarding the utility's abandonment of its construction of the V.C. Summer Units 2 and 3 and sought additional rate increases through revised rates. In its petition, SCE&G informed the Commission that the anticipated completion dates for the units were December 31, 2022 and March 31, 2024. Consequently, SCE&G was no longer in compliance with its BLRA Order No. 2016-794. After the ORS filed its motion to dismiss the SCE&G revised rates petition, SCE&G withdrew both its abandonment and revised rates petitions.

Argument

The South Carolina General Assembly is vested with the constitutional authority to regulate publicly owned utilities. Article IX, Section 1 of the South Carolina Constitution reads as follows:

> Regulation of common carriers, publicly-owned utilities and privately-owned utilities serving the public. The General Assembly shall provide for appropriate regulation of common carriers, publicly owned utilities, and privately owned utilities serving the public as and to the extent required by the public interest. (1970 (56) 2690; 1971 (57) 47).

Thus the South Carolina Constitution requires the General Assembly to protect the public interest in carrying out its responsibilities with respect to public utility regulation.

Ratemaking is a legislative function. Our Supreme Court has held that,

> "[i]t has been held that rate making is not a judicial function…but is a legislative one, whether exercised by the legislature directly or by an administrative body under delegated authority, although subject to review by the courts as to legality and reasonable of its exercise…. It operates prospectively, and necessarily implies a range of legislative discretion, and ordinarily the legislative determination within the scope of discretion is conclusive." Berry v. Lindsay, 256 S.C. 282, 290, 182 S.E.2d 78, 82 (1971)

The General Assembly has vested its authority to regulate public utilities in the South Carolina Public Service Commission. S.C. Code Ann. § 58-3-140(A) reads as follows:

> (A) Except as otherwise provided in Chapter 9 of this title, the commission is vested with power and jurisdiction to supervise and regulate the rates and service of every public utility in this State and to fix just and reasonable standards, classifications, regulations, practices, and measurements of service to be furnished, imposed, or observed, and followed by every public utility in this State. S.C. Code Ann. § 58-3-140(A).

The General Assembly has granted this Commission complete authority to remedy the unconstitutional application of the BLRA as required by Constitutional imperative.

In protecting the public interest, the Commission is required to set rates that are just and reasonable. S.C. Code Ann. § 58-27-810. To ensure that rates are just and

reasonable, the Commission has investigative authority and may initiate inspections, audits, and examinations of all public utilities within its jurisdiction and may direct the ORS to conduct any such investigation which the Commission deems in the public interest. S.C. Code Ann. § 58-3-200. If the Commission finds that existing rates in effect and collected by an electrical utility for any service, product or commodity is unjust, unreasonable, or in any way in violation of any provision of law, the Commission must reject that rate and establish rates that are just, reasonable, and sufficient. S.C. Code Ann. § 58-27-850. If the Commission finds after investigation by the ORS that an electrical utility has put into effect a schedule of rates that is unfair and unreasonable, the public interest compels the Commission to order rates that are just and reasonable. S.C. Code Ann. § 58-27-920. Moreover, the Commission is vested with the authority to order reparations to ratepayers for rates charged by an electrical utility that are unreasonable, excessive, or discriminatory. S.C. Code Ann. § 58-27-960.

While the South Carolina Constitution does not define the term "public interest," the Attorney General's opinion defines the term as follows:

> While the term "public interest" is not defined by Art. IX, § 1, it has a well-established meaning, particularly in the area of utility regulation. The usual meaning of the term "public interest" is "something in which the public, the community at large, has some pecuniary interest, or some interest by which their legal rights or liabilities are affected." Ure v. Bendick, 1993 WL 8538548 (R.I. 1993) (quoting Black's Law Dictionary). SC Attorney General's opinion dated September 26, 2017 at p. 56.

Saddling SCE&G's customers with an annual payment of $445 million in revised rates for two unfinished, abandoned nuclear plants adversely affects the public and community at large. SCE&G suggests that the BLRA was a covenant between the State of South Carolina and SCE&G's investors only. Nothing could be further from the truth. The BLRA was enacted to

protect ratepayers from imprudent expenditures. The purpose of the BLRA was set out by the General Assembly as follows:

> SECTION 1. (A) The purpose of Article 4 of Chapter 33 of Title 58, added by Section 2 of this act, is to provide for the recovery of the prudently incurred costs associated with new base load plants, as defined in Section 58-33-220 of Article 4, when constructed by investor-owned electrical utilities, **while at the same time protecting customers of investor-owned electrical utilities from responsibility for imprudent financial obligations or costs.** [Emphasis added]

By applying the BLRA to require SCE&G's ratepayers to pay annual revenue of $445 million to SCE&G for abandoned nuclear plants, the Commission has failed to protect SCE&G's customers from responsibility for imprudent financial obligations and costs. The question for this Commission is whether requiring SCE&G customers to pay $4.9 billion for useless steel and concrete is in the public interest.

The Attorney General captured the question before this Commission as follows:

> It cannot be in the "public interest" to charge ratepayers for capital costs of an unfinished and abandoned plant. It cannot be in the "public interest" to charge customers in order to pay stockholders an exorbitant rate of return. It is not in the "public interest" to increase the power bills of consumers who receive nothing in return, essentially charging them twice. Thus, we believe that Art. IX, § 1 renders the abandonment provision, as well as the other BLRA provisions discussed herein, to be constitutionally suspect. SC Attorney General's opinion dated September 26, 2017 at p. 57.

The question answers itself. By application of the BLRA, SCE&G's ratepayers have been burdened with the responsibility for payment of cost overruns in the amount of $2.7 billion and since March of 2009 have been forced to suffer nine (9) rate increases associated with the construction of the nuclear plants wherein they contribute $445 million in annual revenue to SCE&G. However, SCE&G has abandoned its construction of V.C. Summer Units 2 and 3 and now offers to provide its ratepayers exactly nothing in return for their payment of $445 million in

annual revenue. The BLRA as applied violates the public interest and violates Article IX, Section 1 of the South Carolina Constitution.

The ORS, having made its investigation of SCE&G's rates and relying upon the opinion of the South Carolina Attorney General dated September 26, 2017, has informed the Commission that SCE&G is charging rates to its ratepayers to recover nuclear costs that are unjust, unreasonable and unlawful, and has requested that the Commission reduce rates to eliminate approximately $445 million in nuclear costs annually.

The ORS request is based upon a thorough examination of SCE&G's rates, and it relies upon compelling legal authority and therefore should be granted. The ORS has investigated and audited all SCE&G dockets set out above. The ORS has audited SCE&G's quarterly reports required by S.C. Code Ann. § 58-33- 277 and Order No. 2009-104(A). Other than the independent analysis of the construction progress conducted by the Bechtel Company which was intentionally withheld from the ORS, the ORS request for rate relief is informed by eight years of inspections, audits and examinations. The Commission has the benefit of a very thorough review of the SCE&G's nuclear construction costs by ORS.

The Attorney General's opinion of September 26, 2017, amply demonstrates the need for rate relief for SCE&G's customers. The General Assembly has delegated sufficient authority to this Commission to act to provide SCE&G's ratepayers with a remedy for recovery of their payment of the unlawful rates charged under the BLRA. Because the ORS investigation reveals that the revised rates paid pursuant to the BLRA are unconstitutional, excessive, unjust and unreasonable, the Commission is compelled to exercise its statutory authority to reduce rates as the public interest requires.

As argued above, Article IX, Section 1 of the South Carolina Constitution requires that rates serve the public interest. The public interest requires that SCE&G's rates benefit ratepayers. The application of the BLRA has not only violated the public interest, but has also resulted in an unconstitutional wrongful taking from SCE&G's ratepayers.

The BLRA provides for an initial termination of prudency which by the terms of the BLRA cannot be challenged thereafter. S.C. Code Ann. § 58-33-275 (A) and (B). So long as the nuclear plants are constructed on schedule and on time, the BLRA provides that SCE&G must be allowed to recover its capital costs through revised rate filings. S.C. Code Ann. § 58-33-275 (C). The early determination of prudency to construct the plants cannot be challenged in proceedings under S.C. Code Ann. § 58-27-810 or 58-33-280. Moreover, the provisions of S.C. Code Ann. § 58-33-280, which provide authority for granting SCE&G annual revised rate increases, are merely an auditing exercise. The Commission is compelled by statute to grant any revised rate increase without notice or opportunity for the ratepayer or the ORS to challenge the rate increase. It is only after the rate increase is put into effect that the ratepayer and ORS have the opportunity to challenge those rate increases and in those circumstances, the ratepayer has a burden of proving imprudent conduct. S.C. Code Ann. § 58-33-280 (A) through (J), S.C. Code Ann. § 58-33-285.

Although, the BLRA was intended to protect ratepayers from responsibility for imprudent expenditures and costs, now that SCE&G has abandoned construction of the plants, the unusual presumptions of prudency set out in the BLRA have rendered any protections to the ratepayers meaningless. As explained by the Attorney General,

> [t]he "balance" which the General Assembly fashioned in the BLRA, particularly with respect to the abandonment provision, is truly one sided. It is highly imbalanced in favor of the investor and against the consumer. There is the unchallengeable conclusion in the Act of prudency to build, as well as that the

> plants are deemed "used and useful" throughout by operation of law. See § 58-33-270(A). Moreover, there are the provisions of allowing "modifications" in § 58-33-270(E) [as opposed to application of "material and adverse deviation" provision of § 58-33-270(E)]. Further, § 58-33-270(E) shifts the burden from the utility being required to prove prudency to one of a challenger required to demonstrate imprudence. See also § 58-33-275(C) [allowing revised rate filings for capital costs virtually automatically]. SC Attorney General's opinion dated September 26, 2017 at p. 31.

As applied, BLRA rate increases were for all intents and purposes put on auto pilot. Opportunity for meaningful review of SCE&G's expenditures were foreclosed by the early determination of prudency and by imposing the burden of proving any imprudence on SCE&G's ratepayers. SCE&G's ratepayers never really stood a chance of paying just and reasonable rates, notwithstanding their statutory and Constitutional protections.

The outcome was foreordained, as explained by the Attorney General,

> [a]ccordingly, when both the "prudency" and "used and useful" principles are conclusively pre-determined by the General Assembly, without a basis in fact or an opportunity for meaningful challenge, as the BLRA does, the balance between investors and ratepayers becomes heavily and unfairly skewed against the consumers. The Act resorts to a "fiction" that incomplete or abandoned nuclear plants are, nevertheless, "used and useful" upon issuance of the initial base load review order even though, of course, they are not. Ground may not even have been broken, but the plant is deemed "used and useful" by the BLRA. Cases indicate that such a conclusive determination, not based upon actual fact, is unconstitutional. In the meantime, customers pay heavily for plants never completed and service never provided. SC Attorney General's opinion dated September 26, 2017 at p. 49.

The South Carolina Constitution offers additional protections to SCE&G's ratepayers. Article I, Section 13(A) of the Constitution provides as follows:

> Except as otherwise provided in this Constitution, private property shall not be taken for private use without the consent of the owner, nor for public use without just compensation being first made for the property. Private property must not be condemned by eminent domain for any purpose or benefit including, but not limited to, the purpose or benefit of economic development, unless the condemnation is for public use.

Here, the public interest can be served only if the rates fixed by the Commission pursuant to the BLRA are put to a public use by SCE&G.

Having been delegated the authority to regulate public utilities by the General Assembly, the Commission must exercise its ratemaking authority in conformance with the South Carolina Constitution. *Feldman and Co. v. City Council of Charleston*, 23 S.C. 57 (1885). It cannot be reasonably argued that these abandoned nuclear plants afford SCE&G's ratepayers a public benefit. Had SCE&G completed the plants, the two nuclear plants would be serving a public purpose. However, as the Commission has applied the terms of the BLRA, permitting SCE&G to recover its costs of the abandoned plants from its ratepayers in violation of Article I, Section 13 and Article IX, Section 1 of the South Carolina Constitution.

As opined by the Attorney General,

> [f]urther, the requirements of our State Constitution, with respect to its "Takings Clause" (Art. I, § 13), are even more stringent with respect to the necessity for a "taking" only for a "public use" than is required by the federal Constitution. As our Supreme Court has emphasized in Ga. Dept. of Transp. V. Jasper Co., 355 S.C. 631, 638, 586 S.E.2d 853, 856 (2000), under our State Constitution, "[t]he involuntary taking of an individual's property by the government is not justified unless the property is taken for public use – a fixed, definite, and enforceable right of use, independent of the will of a private lessor of the condemned property." "'Public use' implies possession, occupation, and enjoyment of the land by the public at large or by public agencies…." Cases such as Edens v. City of Columbia, supra and Karesh v. City Council of Chas., supra and Georgia Dept. of Transp. V. Jasper Co., supra, demonstrate clearly that government cannot take property, and then allow it to be devoted to a private use (such as payment to the investors of a utility). SC Attorney General's opinion dated September 26, 2017 at p. 52.

SCE&G insists that only its investors have constitutional rights. SCE&G's Brief in Support of its Motion to Dismiss, p. 18. SCE&G's argument defies reality in light of the applicability of Article IX, Section 1and Article I, Section 13 (A) of the South Carolina Constitution to the issues in this proceeding. The Commission need not suspend disbelief. The

South Carolina Constitution fully protects SCE&G's ratepayers against unjust, unreasonable and unlawful rates set under the BLRA.

As a result of his thorough analysis of the constitutionality of the BLRA and the impact of the BLRA on SCE&G's ratepayers, the Attorney General has concluded that the application of the BLRA violates Article I, Section 13 (A) of the South Carolina Constitution. The Attorney General reasoned that,

> [w]hen, as here, a statute takes money from ratepayers and then gives to investors of a private company for a plant which is now abandoned and nowhere near being "used and useful," and is producing no service to customers, we believe such is taking for a private use. SC Attorney General's opinion dated September 26, 2017 at p. 52.

This Commission has the authority to determine that the BLRA has been unconstitutionally applied in violation of the South Carolina Constitution. *Travelscape, LLC v. South Carolina Department of Revenue,* 391 S.C. 89, 705 S.E.2d 28 (2011); *Ward v. State*, 343 S.C 14, 538 S.E.2d 245 (2000). To conclude otherwise would deprive the Commission of its statutory authority to provide SCE&G's ratepayers with a remedy for SCE&G's unjust, unreasonable and unlawful rates.

Having concluded that the BLRA as applied is unconstitutional, the Commission must treat the proceedings held pursuant to the BLRA as void and must restore the parties to their circumstances prior to the issuance of Order No. 2009-104(A) on March 2, 2009. When a statute is found unconstitutional, the courts have recognized the general rule that an adjudication of the unconstitutionality of the statute ordinarily reaches back to the date of the act itself. *Bergstrom v. Palmetto Health Alliance,* 358 S.C.388, 596 S.E. 2d 42 (2004); *Feldman and Company v. City Council of Charleston*, 23 S.C. 57 (1885). The decision in *Feldman and Company v. City Council of Charleston*, is particularly instructive here. The City of Charleston had issued $2 million in "fire loan" bonds under a city ordinance which was later ratified by an act of the

Legislature. The Supreme Court held that the City's ordinance and legislative act were unconstitutional and void when enacted which meant that the bonds were not a valid debt of the City and no action could be maintained to enforce their payment. The court concluded that the purpose of the act, fire loan bonds, did not serve a public purpose therefore making the ordinance and legislative enactment unconstitutional. As a result, the fire loan bonds were not enforceable notwithstanding their broad use over a period of years and the resulting adverse impact on the parties to those bonds.

Here, the application of the BLRA has resulted in an unconstitutional taking from SCE&G's ratepayers, and the Commission must now act to remedy this unconstitutional treatment of SCE&G's customers.

Having applied, the BLRA unconstitutionally, the Commission must exercise its authority to declare that as a consequence, SCE&G's ratepayers are entitled to a refund of all rates they have paid SCE&G pursuant to the BLRA. To this end, the Commission should grant the ORS request and order SCE&G immediately to cease collecting revised rates from its customers. However, having determined that the BLRA has been unconstitutionally applied, the Commission must act further and exercise its authority to order that SCE&G refund all amounts heretofore collected by SCE&G pursuant to the BLRA. Therefore, the Commission must initiate an inspection, audit and examination of SCE&G, and after a hearing, determine in what manner and upon what terms credits or refunds should be made to SCE&G's ratepayers. The Commission may require ORS to make further investigation and examination of SCE&G and compel SCE&G to cooperate fully with the ORS examination. After further hearing, guided by the public interest, the Commission must set just and reasonable rates in further remedy to SCE&G's ratepayers.

Conclusion

Therefore, based on the forgoing, the South Carolina Energy Users Committee submits that the BLRA has been unconstitutionally applied and that SCE&G's ratepayers are entitled to a refund of all amounts paid in rates to SCE&G pursuant to the BLRA. Consequently, the South Carolina Energy Users Committee submits that the Commission issue its order,

1) Declaring that the BLRA has been unconstitutionally applied and that all amounts paid pursuant to the BLRA should be refunded SCE&G's customers;
2) Granting the ORS Request for Rate Relief and ordering SCE&G to cease collection of revised rates from its customers immediately;
3) Initiating an inspection, audit and examination of SCE&G; and
4) Directing that a hearing be set to determine the manner and terms upon which SCE&G shall refund the balance of all amounts collected through revised rates, by credit or otherwise.

Respectfully submitted this the 21th day of November, 2017.

Scott Elliott, Esquire
ELLIOTT & ELLIOTT, P.A.
1508 Lady Street
Columbia, SC 29201
(803) 771-0555

Attorney for the South Carolina Energy Users Committee

Columbia, South Carolina

November 21, 2017

CERTIFICATE OF SERVICE

The undersigned employee of Elliott & Elliott, P.A. does hereby certify that (s)he has served below listed parties with a copy of the pleading(s) indicated below by mailing a copy of same to them in the United States mail, by regular mail, with sufficient postage affixed thereto and return address clearly marked on the date indicated below:

RE: Request of South Carolina Office of Regulatory Staff for Rate Relief to SCE&G Rates Pursuant to S.C. Code Ann. § 58-27-920

Docket No.: 2017-305-E

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PLEADING: SOUTH CAROLINA ENERGY USERS COMMITTEE BRIEF OPPOSING SCE&G MOTION TO DISMISS

November 21, 2017

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